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No. 87-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELBA J. TAYLOR, *et al.*,
Petitioners,
v.
HUDSON PULP AND PAPER CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

It is important that issues relating to standards of review be settled, because the outcome of any close case may depend upon which standard the appellate court applies. As the petition shows, that goal is undermined in employment discrimination cases, because the courts of appeals are in disarray over whether to apply the clearly erroneous standard or the plenary review standard when considering the sufficiency of a *prima facie* case under Title VII. (Pet. for Cert. 10-13.) Moreover, as the petition also shows, the Eleventh Circuit, by engaging in widespread fact-finding, consciously ignored the decisions of this Court admonishing courts of appeals to respect the division of functions between appellate courts and trial courts. (*Id.* at 15-17.) The respondents' oppositions do not bridge the conflict among the circuits or justify the court of appeals' role as finder of the facts in this case.

I. The Standard of Review for *Prima Facie* Cases of Employment Discrimination

A. *The Conflict.* As matters now stand, five circuits are in conflict over the standard of review. (Pet. for Cert. 10-13.) Respondent Hudson Pulp and Paper ("Hudson") asserts, however, that "there is no conflict" over the standard of review. (Hudson's Opp. 11.) Nowhere does the company confront the holding in *Gay* v. *Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982), that a district court's determination as to the sufficiency of a *prima facie* case is a question of law subject to plenary review, or the cases that have followed *Gay* on this point. Nor does the company endeavor to explain why the cases that apply a clearly erroneous standard, including the one at bar, do not contradict Gay. To attribute the conflict, as Hudson does, to "the mere fact that several circuit court panels have used less than precise language," (Hudson's Opp. 13) simply ignores Judge Wallace's detailed analysis of the issue in *Gay* and the holdings by panels in five courts of appeals.[1]

The United Paperworkers International Union and its Locals ("the unions") argue that the conflict has been resolved by *Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985), because that case demonstrates that "the clearly erroneous rule [applies] in discrimination cases." (Unions' Opp. 6.) We agree that the clearly erroneous standard applies to issues of fact in discrimination cases. But *Anderson* did not decide what standard should be used to review the sufficiency of a *prima facie* case of discrimination. Indeed, after this Court decided *Anderson*, the courts of appeals have continued to apply the plenary

[1] Hudson erroneously states that *Gay* is a case arising under 42 U.S.C. § 1981, and that *Gay* distinguishes *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), on the basis that *Swint* is a Title VII case. (Hudson's Opp. 10, n.9.) In fact, *Gay* was a disparate treatment case brought under Title VII and § 1981; and *Gay* distinguished *Swint* on the basis that the issue in that case was whether plaintiffs had proved intent to discriminate, not whether they had established a *prima facie* case. 694 F.2d at 545, n.14.

review standard, thus undermining the notion that *Anderson* resolved the conflict. See cases cited in Petition for Certiorari at 13-14, nn. 8-9.[2]

Finally, Hudson argues that resolution of the conflict, if any, will not affect the outcome of this case because whatever standard applies in this case, the result will be the same—affirmance of the district court. (Hudson's Opp. 13.) That prediction is unduly optimistic. The affirmance in this case rested on appellate fact-finding and application of a standard of review that is overly generous to the district court. Even with the aid of these impermissible standards and procedures, the panel's disposition of this case evoked a strong dissent. If the proper standards and procedures were followed, reversal should result. The record in this case is clear that even under the panel's version of the facts, there is no explanation justifying Hudson's refusal to assign females to at least two of the 17 baler positions.[3]

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[2] Petitioners cited a number of cases that applied a plenary review standard to consider the sufficiency of the *prima facie* case of employment discrimination (Pet. for Cert. 11, 13-14). The unions quote from other portions of these cases to show that the clearly erroneous standard was used to review individual questions of fact. (Unions' Opp. 7-8.) That simply shows that the individual elements of a *prima facie* case may involve issues of fact. The overall conclusion as to whether the facts make out a *prima facie* case is, however, an issue of law. (Pet. for Cert. 10, n.6.)

[3] Hudson also argues that "even assuming that a conflict exists, it is certainly not ripe for Supreme Court review when the Circuits themselves [*i.e.*, the Fifth, Sixth, Ninth, and Eleventh Circuits] have not taken a final position on which standard to apply." (Hudson's Opp. 11.) Hudson's approach would postpone resolution of this issue until at least one or more circuits have held rehearings *en banc* and aligned their conflicting cases. The need for uniformity and resolution of conflicts among the circuits, however, is not diminished by the fact that four circuits disagree within themselves as well as disagree with each other over the proper standard of review. See, *e.g.*, *Dickens* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio* v. *Zeitz*, 333 U.S. 56, 59-60 (1948); see also *Scarborough* v. *United States*, 431 U.S. 563, 567 n.4 (1977).

B. *Waiver.* Hudson asserts that petitioners have waived the opportunity to have this Court resolve the conflict because petitioners did not raise the conflict until the petition for rehearing. (Hudson's Opp. 8-10.) In fact, rehearing was the first appropriate occasion to raise the conflict.

When this appeal was taken, the findings of fact actually made by the district court—if not erroneous—would have defeated a *prima facie* case. For example, if it were true, as the district court found, that no vacancies existed, then petitioners could not establish a *prima facie* case of discrimination respecting promotions or transfers. Thus, in briefing this appeal, petitioners needed to demonstrate, and did demonstrate, that the district court's findings were clearly erroneous.

When the court of appeals made new, supplementary findings and attributed them to the district court, that introduced the question of whether, in light of the new findings, petitioners' evidence was sufficient to establish a *prima facie* case. For example, once the court of appeals found that there were 17 vacancies in the baler position, but 15 vacancies were filled on the basis of "temporary" seniority, the question arose whether petitioners' proof was sufficient to establish a *prima facie* case with respect to at least two of the vacancies. The court of appeals erroneously resolved this issue by applying the clearly erroneous standard.[4] Thereafter, petitioners pointed out to the court that its decisions were in conflict.

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[4] Hudson argues that petitioners hoped to sandbag the court of appeals by not raising the conflict: "no matter which standard the court applied, petitioners could later argue that the standard is in dispute and the court should perhaps have applied the other standard." (Hudson's Opp. 10.) If the court of appeals had affirmed the judgment below using the plenary review standard, petitioners could not possibly hope to prevail by asking that the clearly erroneous standard be substituted because that standard grants significant deference to the district court.

In short, contrary to Hudson's contention, this is not a case where the petitioners are asserting new claims for relief that were not timely raised in the court below.

II. The Appellate Fact-Finding

The panel majority ignored this Court's decisions which hold that a court of appeals may not make its own findings of fact in order to supplant clearly erroneous findings made by the district court. Specifically, the panel majority found, in the first instance, (1) that plaintiffs "were aware that Hudson was actively encouraging women to apply for positions" (App. to Pet. for Cert. 7a) and (2) that there were 17 vacancies in the baler position, 15 of which were filled by men with "temporary" seniority in the positions. (*Id.* at 10a-11a.) No one has tried to demonstrate that there was any justification for refusing to assign females to at least two of the baler jobs. Instead, Hudson tries to defend the appellate fact-finding with several unusual arguments.

Hudson mischaracterizes petitioners' argument as an attack on the adequacy, not the accuracy, of the district court's findings. (Hudson's Opp. 14.)[5] Hudson thus claims that petitioners waived their complaints about the district court's findings by failing to ask the district court to amend its findings. In fact, petitioners are attacking the court of appeals' findings. That court had no business making supplemental findings, whether those findings were intended to replace clearly erroneous findings entered by the district court or to clarify vague or inadequate findings of the district court.

Hudson argues that "[t]he idea that the District Court did not make any findings as to the 'petitioners' justifiable belief about the supposed futility of applying for transfers' is quite amazing." (Hudson's Opp. 14.) That "amazing" idea was harbored by Judge Clark in dissent

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[5] Contrary to Hudson's assertion (Hudson's Opp. 14), petitioners did argue in the court of appeals that the district court's findings were clearly erroneous and tainted by an incorrect view of the law.

where he states that: "The district court made no finding as to the state of mind of appellants." (App. to Pet. for Cert. 20a.)[6] Moreover, as Judge Clark points out, the detailed findings made by the court of appeals on petitioners' justifiable belief (App. 7a-9a) are not found anywhere in the district court's opinion. (App. 25a, 26a, 29a.)

On the promotions issue, it is plain that only the court of appeals found that there were 17 vacant baler positions in the relevant period and that 15 of those positions were filled by men with "temporary" seniority. The Company tries to minimize the importance of these appellate findings. Thus, it says that these findings are based on company records introduced by petitioners rather than on oral testimony. (Hudson's Opp. 16, n.13.) There is no requirement, however, that a plaintiff put all of its case in evidence through oral testimony.

Hudson also argues that the finding by the court of appeals that 15 of the 17 vacancies in the baler position were filled by men with temporary seniority is simply a restatement of the district court's finding that there were no vacancies for balers at all. (Hudson's Opp. 17.) This argument is just plain wrong; indeed, even on the court of appeals' own terms, there were at least two vacancies that were not offered to petitioners although their rights to these jobs were indisputably superior to those of the men who were selected.

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[6] Judge Clark also noted that "[i]n fact, all [appellants] testified that they did not think that they were allowed to work anywhere in the plant but in the jobs historically assigned to women." (App. to Pet. for Cert. 20a, n.2.)

[7] The unions assert that they should not be parties to this case any longer because there was no evidence in the record of discrimination by the unions. (Unions' Opp. 10, 12.) A union which has not violated Title VII may nonetheless be retained in a lawsuit as an indispensable party under Federal Rule of Civil Procedure 19(a), to ensure that full relief is granted. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977).

CONCLUSION

The panel majority in this case chose to serve as the fact-finder as well as the reviewing court, notwithstanding this Court's denunciations of that practice. (See cases cited Pet. for Cert. 15-18.) Accordingly, it would be appropriate for this Court to grant *certiorari* and summarily reverse the court of appeals with instructions to vacate its supplementary findings, and to reverse the district court's judgment because it rests on findings that are clearly erroneous. Alternatively, this Court should grant the writ and set the case for briefing on the merits.

Respectfully submitted,

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